72-1689

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1689

STANDARD INDUSTRIES, INC., a corporation, and METROPOLITAN PAVING CO., INC., a corporation,
Petitioners,

VERSUS

MOBIL OIL CORPORATION, a corporation, SUNRAY-DX OIL COMPANY, a corporation, KERR-McGEE CORPORATION, a corporation, and PHILLIPS PETROLEUM COMPANY, a corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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June 8, 1973

Michael Rodak, Clerk
Supreme Court of the United States
1 First Street
Washington, D.C. 20543

Re: *Standard Industries, Inc., et al v. Mobil Oil Co., Inc., et al.*

Dear Sir:

We respectfully request that you place a copy of this letter with each copy of the Petition for Writ of Certiorari transmitted to you yesterday in the above captioned matter. As will probably be obvious to the person reviewing the Petition, there is a printer's error on Page 11 involving the styling of the unreported case of *Gray v. Shell Oil Co.*. The printer styled that case as *Grady v. Shell Oil Co.* both on Page 11 and in the Table of Authorities of the Petition.

I apologize for this error and hope that the distribution of this correcting letter will not be too much trouble. However, inasmuch as the *Gray* case has not yet been reported by the West Publishing Company, we felt the error in the styling of the case might be confusing to the person reviewing our Petition. Thank you very much for your courtesy.

Very truly yours,

John A. Claro

John A. Claro

JAC:bh
Encl: 40 copies of this letter.
CC: Counsel of record

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In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. ----------

STANDARD INDUSTRIES, INC., a corporation, and METROPOLITAN PAVING CO., INC., a corporation,
Petitioners,

VERSUS

MOBIL OIL CORPORATION, a corporation, SUNRAY-DX OIL COMPANY, a corporation, KERR-McGEE CORPORATION, a corporation, and PHILLIPS PETROLEUM COMPANY, a corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners Standard Industries, Inc., and Metropolitan Paving Co., Inc., respectfully request that a Writ of Certiorari issue to review that portion of the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on March 14, 1973, denying to Petitioners a new trial limited solely to the issue of damage. In this Sherman and Clayton Act antitrust case the Court of Appeals was reviewing a trial court error consisting of advising the jury that any damages awarded by it would be trebled by the court. The Tenth Circuit treated the error as "harmless."

OPINIONS BELOW

TENTH CIRCUIT

The opinion of the Court Below in this case (Appendix A, *infra*) has not yet been reported.

The judgment of the District Court, not reported, is set forth in Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1973. A timely Petition for Rehearing was denied on April 27, 1973 (Appendix B.). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is it error, in the trial of a case brought under the Sherman and Clayton Acts (15 U.S.C. 1, *et seq.*) for the court to advise the jury that any damages awarded by it will be trebled by the court?

2. If such is error does it entitle successful plaintiffs to a new trial limited solely to the issue of damages?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The statutory provisions and Rules involved are 62 Stat. 928, 28 U.S.C. 1254(1); Section 1 of the Sherman Act, 15 U.S.C. §1; Section 4 of the Clayton Act, 15 U.S.C. §15; and Rule 19, 1(b) of this Court.

The foregoing statutes and Rule are printed in pertinent part in Appendix C hereto.

STATEMENT OF THE CASE

This is an action brought pursuant to the Sherman and Clayton Acts by two private corporations [Asphalt Paving Contractors] for injury to their business and property occasioned by the purchase of liquid asphalt at a conspiratorally fixed price. The trial court submitted special verdict interrogatories to the jury, which returned a verdict for the Plaintiffs in the amount of $293,314.55 actual damages. That award was based upon the jury's finding that Plaintiffs had paid, on their purchases of liquid asphalt during the time period involved, an illegal overcharge equal to 1¢ per gallon. In his instructions to the jury, over the objection of Plaintiffs, the trial court included the following instruction:

> "As previously stated to you, the Clayton Act provides that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * *and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.*'
>
> "If you find, from a preponderance of the evidence in this case, that plaintiff is entitled to recover, your verdict will be for only such amounts as you shall find from the evidence in the case is reasonably necessary to compensate the plaintiff for damages proximately caused by one or more of the violations of the Federal antitrust laws, which the plaintiff has alleged. *You will not treble that amount, nor will you include any sums for costs of suit, or for a reasonable attorney's fee, since that is no part of the jury's function. That is a question for the Court, in the event the jury return a verdict in favor of the plaintiff for actual or compensatory damages.*" [Instructions to the jury, In-

struction No. 28.] (Emphasis supplied here and throughout this Petition unless otherwise indicated.)

The Court of Appeals held the quoted portion of the instruction to be "error," but determined that it was "harmless" error. Principally relied on by the Court of Appeals in support of its "harmless error" decision was its finding, *unsupported in the record*, that "the jury panel was without doubt made aware of the fact that this was a treble-damage action" because the instant case and a related antitrust case had received pre-trial newspaper publicity. There was no evidence in the record, however, to indicate that the jury panel had ever read any specific newspaper article relating to the treble-damage provision, or was otherwise made aware, except by the trial court's instruction, that their damage verdict was to be multiplied by three. Another circumstance said to support the Court of Appeals' opinion was the fact that in closing argument reference was made to the trebling of actual damages. However, the record affirmatively reflects that this reference was made by Plaintiffs' counsel *only* after all counsel had been affirmatively advised of the court's intention to inform the jury of the prejudicial matter complained of in this Petition. A third reason advanced by the appellate tribunal as justification for the "tripling" instruction was that reference was made to the treble-damage provision elsewhere in the instructions. This is inaccurate. Review of the instructions will reveal that the only place the jury received the "tripling" information was Instruction No. 28, the instruction complained of in this Petition. The fourth reason advanced by the appellate panel as support for its "harmless error" posture was the asserted misconduct of a

witness (who mentioned in answer to a question the amount of *expenses* paid by his corporation in prosecuting this action.)[1] No hearing was even held to determine if the witness was, in fact, guilty of improprietous conduct—or what circumstances were present which might have justified or explained the conduct of the witness. The surprising basis for the Court of Appeals' conclusion appears to be that it was proper to offset the *assumed misconduct* of a single witness by revealing information to the jury which would prejudice both Plaintiff corporations by reducing their ultimate recovery. We respectfully suggest that this theory is not only uniquely erroneous in its application to Sherman Act litigation, but also overlooks other traditional avenues available to deal with situations arising during the course of trial.

REASONS FOR GRANTING THE WRIT

This Writ should be granted for two reasons. First: an "instruction" informing the jury that the actual damage portion of its verdict will be tripled vitiates the very purpose for the enactment of the private treble-damage portion of the Sherman Act. Second, the public policy involved in the uniform enforcement of this nation's antitrust laws would be served by resolving the conflict presently existing between the various circuits (and, indeed, *within* one circuit) concerning the giving of the instruction.[2]

---

[1] Plaintiff's objection had nothing whatever to do with *expenses*—the objection was to informing the jury that the verdict would be trebled.

[2] As will be hereinafter more specifically detailed, the 10th Circuit appears to be in conflict with itself. That Circuit's recent holding in *Semke* v. *Enid Automobile Dealers Association*, 456 F.2d 1361 (1972) cannot be easily harmonized with its subsequent holding in the instant case.

1. This Court has recognized that the enforcement of private antitrust claims acts as a supplement to the government's effort to induce nationwide compliance with its antitrust laws. Indeed, this Court has held that the prosecution of private claims serves "the high purpose of enforcing the antitrust laws." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-131, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969). The provision which allows a private litigant to recover *threefold* the amount of his damage sustained as a result of an antitrust conspiracy was obviously intended by Congress to deter those in the marketplace from engaging in injurious anti-competitive conduct, by attempting to prevent retention of *all* of the fruits of an illegal conspiracy. We respectfully submit, however, that the deterrent effect of the triple-damage provision is improperly circumvented by an instruction which informs the jury that its assessment of damages is to be *tripled.* The statute's effectiveness for the intended purpose is impaired because general background evidence supporting, or explaining the public policy reasons for the legislative enactment of the triple-damage provision can never be properly introduced. The "instruction," therefore, can never have a logical application to the facts *known by the jury.* No jury can have the benefit of the broadly based statistical information concerning the inordinate profitability of price-fixing which has caused Congress to retain the private treble-damage provision of the Clayton Act. A jury has *only* the evidence pertinent to a *single* violation for which an *individual* plaintiff seeks compensation in the case before it. Under these circumstances, it is inherently unfair for that private plaintiff to be required to "justify"

receipt of *three* times the damage to which he has proven himself entitled under the evidence. The jurors readily recognize that such an award is not "compensation" for the injury sustained in *any* sense of the word. Nonetheless, the jurors are never informed of why such an apparently "unfair" result is both legally and logically beneficial to the public interest.

The prejudice precipitated by placing Plaintiffs in such a patently precarious posture can be gleaned from the economic data contained in the instant record. The case was submitted to the jury on special verdict interrogatories; the jury was directed to determine the amount of overcharge paid on a "per gallon" basis. There was evidence from which the jury could have easily determined that the overcharge was 3¢ per gallon. [In fact, although the evidence of liability was sharply contested, the *great* weight of the evidence indicated that if there was a conspiracy to fix prices (as the jury so found), the fair market value was 3¢ *less* than the Plaintiffs paid for the product in question.] Here, however, by returning a verdict for the full 3¢ per gallon overcharge the jury would have known that in case of one plaintiff (Metropolitan), it would receive *more* than was paid for the product! Any juror's natural desire to *compensate* an injured plaintiff for the damages proven is more than offset by the equally understandable desire to prevent a "windfall" recovery of *triple* the amount justified by the evidence which has been heard. In the instant case the jury's reaction to the information contained in the "triple-damage" instruction was predictable. The jury awarded damages based upon an overcharge of 1¢ per gal-

lon, with the full knowledge that the trial court would then "make plaintiffs whole" by providing the remaining 2¢ per gallon justified by the evidence. The public policy aspect of the private treble-damage provision was thus lost. There is no deterrent in merely requiring price-fixing Defendants to give back the same amount of money illegally taken from their victims and retained "interest-free" for years.

For the above reasons, we respectfully submit that the trebling of an actual damage award is properly a *judicial* function, to be performed only after the jury determines by its verdict the amount of actual damage sustained; "trebling" constitutes no more a part of a juror's "duty" than the assessment of costs and attorney fees. The instruction is particularly onerous in a case such as the instant one where the jury is not even requested to return a general verdict—but merely to answer questions involving the amount of the overcharge. We submit, therefore, that no arguably proper purpose was served when the trial court acceded to the Defendants' request and imparted prejudicial, irrelevant information to the jury.

2. Certiorari should be accepted because the propriety of giving a "treble-damage" instruction constitutes an issue of importance in connection with the general enforcement of the antitrust laws on which there is presently unresolved confusion and conflict among the lower courts.

Perhaps the most widely cited case on the topic is *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 135 F.Supp. 4 (D.C., D.C., 1955), *reversed on other grounds* 243

F.2d 418 (C.C.A., D.C., 1957), *cert. den.* 355 U.S. 822, 78 S.Ct. 29, 2 L.Ed.2d 38 (1957), *reh. den.* 355 U.S. 900, 78 S.Ct. 259, 2 L.Ed.2d 197, *motion for leave to file second petition for rehearing denied* 357 U.S. 923, 17 S.Ct. 1358, 2 L.Ed.2d 1363 (1958). In that opinion Judge Holtzoff set forth in rather explicit terms the reasons for denying a defense request to inform the jury that their award would be tripled. *Id.*, 135 F.Supp. 11. The holding in *Webster Motor Car* was followed in *Sablosky* v. *Paramount Film Distributing Corporation* (D.C., E.D. Pa. 1955), 137 F.Supp. 929, 941-942, wherein the Court likewise denied a request by the Defendant that a treble-damage instruction be given to the jury, or, in the alternative, that defense counsel be permitted to so advise the jury in closing argument. However, in *Cape Cod Food Products* v. *National Cranberry Association* (D.C., Mass. 1954), 119 F.Supp. 900, 911, Judge Wyzansky revealed to the jury that the damage award they returned would be trebled, indicating that such information was being imparted to prevent the members of the jury panel from being misled by "something that you see in the Complaint."[3] Some District Courts have, no doubt, followed Judge Wynzanski's published opinion, even though the "confusion" mentioned there could have no

[3] Judge Holtzoff, in *Webster Motor Car, supra,* likewise recognized the possibility of confusion in those forums where the pleadings are given as a matter of course to the jury. (Id., 135 F.Supp. 11) However, in other courts, *including the one in which the instant action was tried* the problem could not have arisen because the pleadings are *never* shown to the jury. In fact, in the case at bar the trial court directed that the pre-trial order be "substituted" for the pleadings. The contentions of the parties in the pre-trial order (which were read to the jury) contained no reference whatsoever to *"treble"* damages, costs or attorney's fees, all of which were considered to be matters solely for the court.

logical relation to a case submitted on special verdict interrogatories. Additionally, in *Timberlake, Federal Treble-Damage Antitrust Actions* (1965), the author reveals at page 282 that various District Courts in Georgia, Massachusetts, Colorado, Illinois, New York, California and Florida have apparently followed the view espoused by the Second Circuit in *Bordanaro Brothers Theatres, Inc.* v. *Paramount Pictures, Inc.*, 203 F.2d 676 (2nd Cir. 1953), which also approved of informing the jury that its verdict would be tripled. Although a consideration of the particular facts in *Bordanaro Brothers, supra,* would indicate some rather obvious reasons for distinction, a conflict between the 2nd and 10th Circuits has been noted by the latter. In *Semke* v. *Enid Automobile Dealers Association,* 456 F.2d 1361 (10th Cir. 1972), the 10th Circuit held that the giving of such an instruction was error because:

> "The consequence of advising the jury of this can only be that the jury will adjust its award accordingly. But in an antitrust case it is not for the jury to fix the amount of the judgment. Its function is completed once it determines the amount of *damages*. As we view it, therefore, it serves no useful function to communicate this information to the jury and it is potentially harmful, and hence this action of the trial court was error.
>
> "If the judgment were to be affirmed, we would consider the error harmless since there existed little room in the evidence under the trial court's instruction to award *any* damages. In view, however, of the limited retrial, we must notice the ruling so that it can be avoided on retrial." *Id.*, 456 F.2d 1370. (Emphasis by the Court.)

As is indicated by the above, the 10th Circuit viewed the error as harmless *only* in circumstances where the jury could not, under the instructions as a whole, award any damages at all and would, therefore, not succumb to the prejudicial effects of the instruction mentioned above by "adjusting" the damage award downward. The rather sound legal concept enunciated in *Semke* in 1972 is quite obviously at odds with the circuitous reasoning employed by the *same* Appellate Court less than one year later to justify the giving of the *identical* instruction in the case at bar. The value of either case as precedent is doubtful at present.

Further illustration of the need for a definitive standard can be found in the request presently before this Court for review of the 9th Circuit's decision which apparently approved, *sub silentio,* a San Francisco District Court action of advising a jury of the trebling provision of the Sherman Act. See *Grady* v. *Shell Oil Co.*, — F.2d — (1972), 1972 Trade Cases ¶74,274. [*Gray*, Supreme Court Dkt. 72-1305].

The 2nd Circuit has one view *(Bordanaro);* another is approved by the Court of Appeals for the District of Columbia *(Webster Motor Car);* the 9th Circuit's view is presently unclear *(Gray);* and the 10th Circuit's position is one of utter confusion, precipitated by contradictory opinions *(Semke* and *Standard Industries).* Under these circumstances one could not be surprised to find the confusing pot pourri of positions presently espoused by District Courts. We respectfully submit that this Court should accept Certiorari in the instant case and provide intelligible

guidelines on the instant subject matter. We respectfully submit that the prejudice which inures to a plaintiff's cause through the giving of a "trebling" instruction is of such seriousness that the failure of this Court to determine the matter could well result in forum shopping by injured plaintiffs who are in a position to do so pursuant to the venue provisions of 15 U.S.C. §15.

CONCLUSION

In this instrument Petitioners have not addressed themselves at all to what is felt to be a rather well established rule of law relating to the second question presented for review. We respectfully submit that if the instruction in question is error, it could *only* prejudice the Plaintiffs with regard to *the amount* of their recovery. This fact is recognized in the opinion of the 10th Circuit in *Semke* v. *Enid Automobile Dealers Association*, 456 F.2d 1361 (10th Cir. 1972), and was likewise recognized by the trial court judge in the instant cause who listed as one of his reasons for giving the instruction the fact that it might "bridle the jury" with regard to the amount of Plaintiffs' recovery. The error could have nothing whatever to do with the question of Defendants' liability. This Court has previously held that an error affecting damage only does not necessitate a new trial on the issue of liability. See *Gasoline Alley Products Co.* v. *Champlin Refining Co.*, 83 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931). We do not propose to elucidate

further upon that point because of our belief that it is not a unique question; we have included it under this heading simply because of our desire to be complete.

Respectfully submitted,

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June, 1973

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JANUARY TERM — 1973

FILED
United States Court of Appeals
Tenth Circuit
MAR 14 1973
HOWARD K. PHILLIPS
Clerk

STANDARD INDUSTRIES, INC., a Corporation, and METROPOLITAN PAVING CO., INC., a Corporation,	)	
Plaintiffs-Appellants,	)	Nos. 71-1115
	)	71-1116
v.	)	71-1117
	)	71-1118
MOBIL OIL CORPORATION, a Corporation, SUNRAY-DX OIL COMPANY, a Corporation, KERR-McGEE CORPORATION, a Corporation, and PHILLIPS PETROLEUM COMPANY, a Corporation,	)	71-1119
Defendants-Appellees and Cross-Appellants.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. 66-478)

Bert Barefoot, Jr., and John Anthony Claro (Edward H. Moler, Barefoot, Moler & Claro, and Joseph A. Claro of Counsel, on the brief), for Plaintiffs-Appellants.

[APPENDIX]

A. Duncan Whitaker (Edward F. Howrey and Michael M. Levy; Charles F. Rice, S. M. Groom, Jr., Howrey, Simon, Baker & Murchison, of Counsel, on the brief), for Defendant Mobil Oil Corporation, Appellee & Cross-Appellant.

John J. Runzer (John A. Ladner, Jr., Edith G. Laver, Pepper, Hamilton & Scheetz, on the brief), for Defendant Sunray-DX Company, Appellee & Cross-Appellant.

Coleman Hayes (Willard P. Scott, Carl G. Engling, Monnet, Hayes, Bullis, Grubb & Thompson, on the brief), for Defendant Kerr-McGee Corporation, Appellee & Cross-Appellant.

Richard B. McDermott (Boesche, McDermott & Eskridge, and S. E. Floren, on the brief), for Defendant Phillips Petroleum Company, Appellee & Cross-Appellant.

Before LEWIS, Chief Judge, McWILLIAMS, Circuit Judge, and THEIS, District Judge.

McWILLIAMS, Circuit Judge.

This is a civil antitrust action brought by two corporations to recover damages incurred when they purchased liquid asphalt, to be utilized in the construction of roads, highways, runways and the like, at a "rigged" price in excess of fair market value, such price rigging allegedly having been the result of an unlawful combination and conspiracy in restraint of trade in violation of the provisions of the Sherman Act and the Clayton Act. 15 U.S.C. § 1, *et seq*. The defendants named in the complaint were numerous petroleum refiners and marketing entities which produced and sold liquid asphalt as a by-product of the crude oil cracking process.

The two corporations which instituted the proceedings are Standard Industries, Inc., a Delaware corporation, and Metropolitan Paving Company, Inc., an Oklahoma corpo-

ration, both general construction contractors with the former headquartered in Tulsa, Oklahoma, and the latter in Oklahoma City, Oklahoma.

As indicated, the defendants were various petroleum refiners and marketing entities located in Oklahoma and Kansas and initially were some twelve in number. Settlement was made with certain defendants prior to trial. Upon trial, the jury returned a verdict in favor of one defendant, Skelly Oil Company of El Dorado, Kansas, and against the four remaining defendants. Those four are: (1) Mobil Oil Corporation, which operated a refinery in Augusta, Kansas; (2) Sunray DX Oil Company, which operated a refinery in Tulsa, Oklahoma; (3) Kerr-McGee Corporation, which operated refineries at Wynnewood and Cushing, Oklahoma; and (4) Phillips Petroleum Company, which operated refineries at Okmulgee, Oklahoma, and at Kansas City, Kansas.

An eight-week trial culminated in the submission to the jury of a series of special interrogatories. The jury found, *inter alia*, that the four defendants had conspired to fix the price of liquid asphalt purchased by plaintiffs in Oklahoma from January 1962 to December 1966; that plaintiffs had suffered damages by way of an "overcharge" during the existence of the conspiracy; and that none of the "overcharge" had been "passed-on" by either of the plaintiffs.

Based, then, on the jury's various answers to the special interrogatories, the trial court entered a judgment in the sum of $133,684.06, together with the sum of $42,000 for attorney's fees, plus costs in the amount of $3,550.22, in favor of Standard and against the four petroleum companies which the jury found guilty of antitrust violations. As concerns Metropolitan, judgment was entered in its favor and against the same four companies in the sum of $286,128.01, together with the sum of $84,000 for attorney's fees, plus costs in an amount of $7,100.44. In sum, judgment was

entered in favor of the two plaintiffs against the four petroleum companies, jointly and severally, in a total amount of $556,462.73, such sum taking into account previous settlements made with other defendants prior to trial. All parties now appeal.

Standard and Metropolitan complain here about the amount of their judgment, and seek a new trial limited to the issue of damages. The four appealing defendants, i.e., Mobil, DX, Kerr-McGee, and Phillips, on a variety of grounds seek a new trial limited to the issue of liability. These wide-ranging grounds of alleged error will be grouped into two categories: Alleged Pre-Verdict Error and alleged Post-Verdict Error.

Alleged PRE-VERDICT ERROR

1. Treble Damage Instruction.

Section 15 of 15 U.S.C. provides that any person injured by reason of anything forbidden in the antitrust laws may sue therefor "and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." In regard to the matter of damages, the trial court instructed the jury as follows:

> "* * * If you should find, from a preponderance of the evidence in this case, that plaintiff is entitled to recover, your verdict will be for only such amounts as you shall find from the evidence in the case is reasonably necessary to compensate the plaintiff for damages proximately caused by one or more of the violations of the Federal antitrust laws, which the plaintiff has alleged. *You will not treble that amount, nor will you include any sums for costs of suit, or for a reasonable attorney's fee, since that is no part of the jury's function. That is a question for the court, in the event the jury return a verdict in favor of the plaintiff for actual or compensatory damages.*" (Emphasis added.)

The plaintiffs contend that the giving of the aforesaid instruction constituted reversible error because such was "inherently unfair" in that it placed on the plaintiffs the burden of explaining why they should ultimately recover three times their actual damage and, in practical effect, necessarily caused the jury to adjust downward its damage award.

In thus arguing, plaintiffs rely on our recent case of Semke v. Enid Automobile Dealers Association, 456 F.2d 1361 (10th Cir. 1972), decided by us after the trial of the instant case. In *Semke,* after recognizing that there was a split of authority on the matter, we held that it was error to give an instruction which informed the jury that its damage award *would* be trebled by the court, but that in the context of that case it was only harmless error. We adhere to the rule of *Semke*, but here, as in *Semke*, under the circumstances any error is deemed harmless.

In pre-trial newspaper publicity of considerable proportions, the jury panel was without doubt made aware of the fact that this was a treble damage action. Such publicity included articles published in the local Oklahoma newspapers between 1966 and 1969 concerning not only the nature of the claim asserted in the instant case, but also articles relating to the antitrust action brought by the State of Oklahoma in regard to the State's purchases of the same types of liquid asphalt. Many of these articles stated that the suits involved amounts which were triple the amount of damages allegedly suffered. Furthermore, in closing argument there was some comment by counsel concerning the treble damage aspect of the case, although such was said to be in anticipation by counsel that the trial court would instruct on the matter. And in the instructions other than the particular part here complained about, reference was made that under the Clayton Act the injured party should recover "threefold the damages by him sustained,

and the cost of the suit, including a reasonable attorney's fee."

In addition, as will later be more fully developed, the witness Kavanaugh, president of Metropolitan, in violation of an order of court, in a voice inaudible to the court and counsel, but audible to the court reporter and at least some jurors, volunteered that he had already incurred expenses in the sum of $150,000.

It was in this general setting, i.e., considerable pretrial publicity, some discussion about treble damages in closing arguments, and misconduct by the witness Kavanaugh, that the court felt constrained to affirmatively instruct the jury that in the event it found for the plaintiffs it should award the plaintiffs their actual damages, and that the matters of trebling, costs and attorney's fees were "no part of the jury's function" and were "questions" for the court. Under such circumstances, we conclude that the giving of the instruction in question did not constitute reversible error. Repeating, the jury was correctly instructed as to the damages that could be awarded and then simply informed that the other matters, i.e., trebling, costs, and attorney's fees were "questions" for the court. We perceive no prejudice to the plaintiffs from the instructions thus given.

Nor are we convinced by the further argument on this point that the jury did in fact reduce its damage award by fixing plaintiffs' damages at exactly one-third what the evidence indicated it was entitled to. This assumes that the plaintiffs' evidence compelled the jury to assesss their damage at the rate of 3¢ per gallon of liquid asphalt purchased. We do not view the evidence as compelling any such result. The extent of plaintiffs' damages was, as were most of the issues in the case, disputed issues and the jury's monetary award finds support in the record.

2. "Passing on" Instruction.

As above indicated, the two plaintiffs were general construction contractors and as an incident to their business both used so-called "asphaltic concrete," which is made by mixing aggregates, such as sand, crushed rock, and the like, with liquid asphalt. The liquid asphalt was purchased by the plaintiffs from certain of the defendants and such, of course, forms the root of this entire controversy. In this regard, one of the defenses raised by the defendants was that the plaintiffs had merely "passed on" to those with whom the plaintiffs dealt any overcharge suffered by plaintiffs at the hands of any of the defendants. The instruction given the jury on this particular matter is set forth below.[1]

By its answer to special interrogatories, the jury determined that neither of the plaintiffs had "passed on" any overcharge. The plaintiffs now argue that the giving of the instruction on "passing on" was error under Han-

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1 *"INSTRUCTION NO. 27*

"PASS-ON DEFENSE: As one of the defenses herein the defendants contend that even though the jury should find that a conspiracy existed which resulted in artificially high prices for liquid asphalt the plaintiffs nonetheless may not recover in this case because of their failure to show that they were thereby injured in their business or property. In this connection it is alleged by defendants that whatever price the plaintiffs paid for asphalt was shifted or 'passed-on' to those with whom plaintiffs contracted and by reason thereof the contractors, as middlemen, suffered no loss whatever.

"In your consideration of this issue you are told that in cases of this nature the 'pass-on' defense, while sometimes proper, has rather limited application and is generally available only to a 'cost-plus' contractor or to a middleman who buys a product then resells same in unchanged form to a consumer under such condition that the original cost and handling charges can be traced with a fair degree of certainty. If, while in the hands of the middleman, the product is processed so as substantially to lose its identity and form and the processing costs are incapable of exact calculation, the defense of 'pass-on' becomes unavailable. The burden rests with defendants to prove the defense of 'pass-on' as is heretofore stated in these instructions."

over Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), and that notwithstanding the finding by the jury that there was no "passing-on", the very giving of the instruction tended to prejudice the plaintiffs' entire case in the eyes of the jury. We disagree.

In the first place, it requires a degree of clairvoyance that we do not possess to conclude that the jury's finding that the plaintiffs did *not* pass on the overcharges somehow prejudiced the plaintiffs' entire case in the eyes of the jury. Such reasoning we do not follow. *See* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) at 629; Bass v. Dehner, 103 F.2d 28, at 34 (10th Cir. 1939), *cert. denied*, 308 U.S. 580 (1939).

Furthermore, as we read Hanover, at 494, the Supreme Court did not completely rule out passing-on as a defense in an action of this nature. Indeed, the court recognized "that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." In our view, the instruction given does not offend *Hanover* and was narrowly drawn so as to be in accord with the foregoing language from *Hanover*. For these reasons, we find no error in the giving of this instruction.

3. Peremptory Challenges.

The trial court granted each of the two plaintiffs three peremptory challenges, making a total of six for the two, and granted each of the five defendants who went to trial two peremptory challenges, to be exercised separately, making a total of ten challenges for the defendants. The plaintiffs now complain that granting to them a total of six peremptory challenges, as contrasted to the ten granted the defendants, constitutes reversible error, even though the jury ultimately selected found in their favor and

awarded substantial damages. It is difficult for us in this situation to find any prejudice to the plaintiffs. Also, in our view prejudice is not shown by pointing out, by way of hindsight, jurors whom the plaintiffs would have peremptorily challenged if they had been allotted ten challenges, instead of six. Be that as it may, we find no error on the part of the trial court in its order regarding peremptory challenges.

Section 1870 of 28 U.S.C. initially provides that each party in a civil case shall be entitled to three peremptory challenges. Such was afforded the two plaintiffs, though each of the five defendants did not get three peremptory challenges, only two. That same statute also provides that multiple plaintiffs or defendants "may" be treated as a single party or the trial court "may" allow additional peremptory challenges and "may" permit them to be exercised either jointly or separately. By use of the word "may," we have held that this latter provision confers a judicial discretion on the trial court. John Long Trucking, Inc. v. Greear, 421 F.2d 125 (10th Cir. 1970). In the instant case, we find no abuse of that discretion. See Albina Engine and Machine Works, Inc. v. Abel, 305 F.2d 77 (10th Cir. 1962).

See also Nehring v. Empresa Lineas Maritimas Argentinas, 401 F.2d 767 (5th Cir. 1968), *cert. denied*, 396 U.S. 819 (1969), where it was held that the plaintiff did not have a *right* to the same number of peremptory challanges as granted multiple defendants.

4. Evidence of Alleged Conspiracies Involving Sales of Liquid Asphalt in Kansas and Missouri.

By answer to a special interrogatory, the jury determined that the four appealing defendants, i.e., Mobil, DX, Kerr-McGee, and Phillips, had conspired to fix, maintain and stabilize the price of liquid asphalt purchased by the plaintiffs in Oklahoma. As a part of their case, the plain-

tiffs, over objection, introduced evidence that the conspiracy in question did not respect state boundaries and that its effect was felt in Kansas and Western Missouri to the end that there was price firing by certain of these defendants, and others, in those areas, as well as in Oklahoma. Expert testimony adduced by the plaintiffs was to the effect that the relevant economic market included not only Oklahoma, Kansas and Western Missouri, but included also such states as Nebraska, South Dakota, Iowa, Minnesota, and Wisconsin.

It was an integral part of plaintiffs' theory of the case that the Oklahoma refiners agreed not to market in Kansas, and that the Kansas refiners in turn agreed not to market in Oklahoma, to the end that the barrier between these two states was described by some as being a vertiable "Berlin Wall," through which liquid asphalt did not pass from one state to the other, although *other* petroleum products flowed freely between the two states. And as the culmination of the conspiracy, the price for liquid asphalt in Oklahoma, according to the plaintiffs, was then set artificially high to the end that bids by refiners to both the state and private contractors were invariably identical and constant in the price bid. Similarly, in Kansas the Kansas refiners, free from Oklahoma competition, set their price for their liquid asphalt sold in Kansas.

As concerns Western Missouri, it was plaintiffs' theory of the case that the Kansas and Oklahoma refiners "cooperated" in this area and divided up the market at prices mutually agreed upon.

Regarding Nebraska, South Dakota, Iowa, Minnesota, and Wisconsin, plaintiffs contended that the defendants and the other coconspirators did engage in real price competition in those areas. And in our view of the record, there is evidence, both direct and circumstantial, to support this general theory of the case.

Upon trial, defendants objected strenuously to the introduction of any evidence pertaining to the existence of any conspiracy involving any defendant extending into Kansas or Western Missouri. Such evidence was said to be irrelevant and highly prejudicial. These objections were overruled and the defendants now assign such ruling as error necessitating a new trial on the issue of liability only. We perceive no error in this particular regard.

The evidence of the activities of these defendants, and others, in Kansas and Missouri was a part of an overall scheme and had relevance and probative value as tending to circumstantially prove the particular facet of the conspiracy which ended in price fixing in Oklahoma operating to the detriment of the plaintiffs. Noerr Motor Freight v. Eastern Railroad Presidents Conference, 155 F.Supp. 768 (E.D.Pa. 1957), *aff'd per curiam*, 273 F.2d 218 (3rd Cir. 1959); *rev'd on other grounds*, 365 U.S. 127 (1961), contains pertinent comment on this particular matter. In that case, the trial court declared as follows:

> "Because of the magnitude and importance of the case the Court permitted great latitude in the introduction of evidence. The trial court in any antitrust case has wide discretion in the admission or exclusion of cumulative and collateral evidence * * *. The evidentiary problems arising at trial may be placed in six distinct categories. The first relates to the admission into evidence, over the strenuous objection of the defendant, of proof of activities in the railroad-Byoir campaign which occurred outside of Pennsylvania. Since the conspiracy was not originated in Pennsylvania, the proof of outside activities was important, not only to show its formation but to show its method of operation, all of which had a great bearing on the fundamental question of intent and injunctive relief, if an illegal conspiracy actually existed. The complaint charged an overall conspiracy in the

whole of the northeastern part of the United States. *Because the plaintiffs limited themselves to proof of damages only within the State of Pennsylvania, the defendants contend that plaintiffs should be likewise limited in proof of the conspiracy. Such result, of course, does not follow.* * * *" (Emphasis added.)

Counsel contend that our holding in United States v. Wilshire Oil Company of Texas, 427 F.2d 969 (10th Cir. 1970), *cert. denied*, 400 U.S. 829 (1970), was that the Missouri and Kansas conspiracies were each distinct from the other and that accordingly each was necessarily distinct from any Oklahoma conspiracy to the end that evidence of either a Kansas or Missouri conspiracy would not be competent evidence of an Oklahoma conspiracy. Such, in our view, does not necessarily follow. The fact that in *Wilshire* we held that the Kansas and Missouri conspiracies were separate and distinct, to the end that *Wilshire* in the Kansas criminal antitrust proceeding could not avail itself of the plea of double jeopardy based on its prior conviction in the Missouri criminal proceeding, does not resolve the present matter. Even assuming that the Kansas, Missouri and Oklahoma conspiracies were distinct, such does not mean that evidence of the first two is inadmissible in a case grounded on purchases made by the plaintiffs in Oklahoma. Certainly on the record before us such were so interrelated that evidence of one was some evidence of the other. *See* American Medical Ass'n v. United States, 130 F.2d 233 (D.C.Cir. 1942), at 251-52, *aff'd*, 317 U.S. 519 (1942), and Greater New York Live Poultry Chamber of Commerce v. United States, 47 F.2d 156 (2d Cir. 1931), at 159, *cert. denied*, 283 U.S. 837 (1931).

In short, then, the jury in our view was entitled to know the full story and the trial court did not err in refusing to limit the plaintiffs to proof of events occurring within the territorial limits of the State of Oklahoma. *See also*, for example, Kansas City Sar Company v. United States, 240 F.2d 643 (8th Cir. 1957), *cert. denied*, 354 U.S.

923 (1957), where it was declared, at 650, that when intent is an issue, as it was here, it has always been deemed proper, in civil or criminal antitrust proceedings, to introduce "evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment."

5. Admitting Evidence to the Effect that the State of Oklahoma was Interested in Plaintiff's Claim.

The State of Oklahoma had previously brought a civil antitrust action against DX, Kerr-McGee, and Phillips seeking treble damages for liquid asphalt purchased by it. Trial in that proceeding ended in a substantial judgment for the State. There was no direct appeal, as such, from that judgment, the matter being settled, although one facet of the case was later before us in State of Oklahoma ex rel. Wilson v. Blankenship, 447 F.2d 687 (10th Cir. 1971), *cert. denied,* 405 U.S. 918 (1972).

The trial court's ruling in the instant case was that there would be "no mention" of the antitrust claim successfully asserted by the State. However, in the present proceeding, the plaintiffs did call as its witnesses numerous state officials who had testified in the earlier trial. Additionally, certain exhibits used in the earlier trial were also marked and used in the instant one. The defendants now claim this to be error, arguing that the jury was necessarily apprised of the successful antitrust claim of the State, and that such inevitably worked to their detriment. This argument is untenable. Certainly the plaintiffs were not precluded from calling as their witnesses various state officials and using exhibits prepared by them for the earlier case, assuming the witnesses were otherwise competent and the exhibits otherwise relevant and material to the issues in the present case.

6. Admission of Inadmissible Evidence.

Defendants assert the case should be reversed because the trial court admitted, over objection, evidence which was allegedly inadmissible and highly prejudicial. In thus arguing, counsel includes such items as: (1) Permitting the plaintiff's two economists to testify as to the ultimate issue in the case, i.e., the existence of a conspiracy on the part of the defendants; (2) admitting a letter which tended to impeach the testimony of the president of an asphalt-producing refinery which marketed through Mobil, the witness having previously been called by Mobil as its witness, when no proper foundation had been laid; (3) permitting the introduction of hearsay evidence, and the like.

We do not propose to get into any extended discussion of evidentiary matters such as those enumerated above. We would note, in passing, that all of the economists who testified upon trial, two being called by the plaintiffs and three by the defendants, expressed their opinions as to the "competitive" or, as the case may be, the "noncompetitive" nature of the liquid asphalt market and some no doubt did come close to giving an opinion as to whether there was or was not a conspiracy. However, such is not necessarily error. As early as New York Life Insurance Co. v. Doerksen, 64 F.2d 240 (10th Cir. 1933), and Francis v. Southern Pac. Co., 162 F.2d 813 (10th Cir. 1947), *aff'd*, 333 U.S. 445 (1948), we held that in a wide range of cases where the issue is one with which a lay juror is unfamiliar, expert testimony is not only admissible, but that, as was said in *Francis*, it was "not a well-grounded objection that the opinion elicited from the expert relates to the issue to be resolved by the jury."

Be that as it may, any possible error on the part of the trial court in the reception of evidence at trial would under the circumstances of this case be only harmless error. Fed.R.Civ.P. 61 specifically refers to error in the

admission of evidence and declares that such error is not ground for ordering a new trial unless such be deemed "inconsistent with subsantial justice." None of the alleged error with respect to the admission of evidence in the instant case meets that test. Moreover, in this regard it is difficult for us to believe that the outcome of an eight-week jury trial could turn on the allegedly inadmissible evidence here complained about by the defendants.

Finally, it has been held that in an antitrust case the trial court has a wide discretion in the admission or exclusion of cumulative or collateral evidence. Moerr Motor Freight v. Eastern Railroad Presidents Conference, *supra*, citing, at 836, United States v. General Motors, 121 F.2d 376 (7th Cir. 1941), *cert. denied*, 314 U.S. 618 (1941), and Kansas City Star Company v. United States, 240 F.2d 643 (8th Cir. 1957), *cert. denied*, 354 U.S. 923 (1957). For all these reasons, then, we conclude that there was no reversible error committed by the trial court in any of its rulings on the admissibility of evidence.

7. Misconduct of Witness Kavanaugh.

A. J. Kavanaugh, president of Metropolitan, was called as a witness by the plaintiffs and was examined and cross-examined at great length. The trial court ruled that he could not testify as to the expense allegedly incurred by him in preparing and pressing his claim against the defendants. In violation of that order, Kavanaugh, apparently in an aside to the jury, did assert that he had borrowed $150,000 to pay his share of the expense incurred in pushing his claim against the defendants. This remark, which occurred simultaneously with an objection to a question posed to the witness, was not heard by court or counsel, but was recorded by the court reporter. The entire matter apparently came to light sometime later, at which time the trial court refused the defendant's request that a mistrial be declared. The defendants now assert that they are entitled to a new trial, presumably on the

issue of liability only, because of this incident, which is said to have prejudiced their case to the extent that an instruction to disregard was insufficient to insure a fair and impartial trial. We disagree.

The matter of declaring a mistrial, or not, because of improper, voluntary statements of a witness varies according to the atmosphere of each trial. Beck v. Wings Field, Inc., 122 F.2d 114 (3d Cir. 1941). Of necessity it is a matter peculiarly within the sound discretion of the trial judge. He is on the scene and is in a better position than we, as a reviewing court, in assessing the potentially prejudicial impact of conduct such as that ascribed to Kavanaugh. In the instant case, the trial judge was very concerned, and rightly so, with Kavanaugh's misconduct and its possible effects, but felt, after holding a hearing *in camera* on the matter, it was not of such proportions as to necessitate declaring a mistrial. And our review of the record has disclosed nothing which would lead us to conclude that the trial judge abused his discretion in this regard. *See*, for example, Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966).

8. Insufficiency of Evidence to Mobil and DX.

Mobil and DX contend that there is insufficient evidence that either of them was involved in the conspiracy about which the plaintiffs complain to the end that a directed verdict should have been entered in their favor. These involve separate consideration.

DX was headquartered in Tulsa, Oklahoma, and the witness Metcalf, president of Standard, testified that from 1955 to 1966 Standard, which was also Tulsa based, had purchased over 15 million gallons of liquid asphalt from DX. There was evidence, both direct and circumstantial, that the price paid by Standard was fixed by DX at a figure which was identical and constant with the price charged by other Oklahoma refiners and that DX was a part of

the conspiracy to maintain the price of liquid asphalt at an artificially high figure. In short, in our view there is sufficient evidence to sustain the jury's determination that DX was a party to the conspiracy that resulted in damage to these plaintiffs.

Mobil is in a slightly different situation. Though it was a defendant in the criminal indictments returned in Missouri and Kansas, it was not a defendant nor a named conspirator in the civil antitrust action brought by the State of Oklahoma, which has been referred to above. As indicated, however, it is plaintiff's contention that as one facet of the overall conspiracy, Mobil, and other Kansas refiners, agreed to stay out of Oklahoma, in return for which the Oklahoma refiners agreed not to market their liquid asphalt in Kansas. There was evidence that during the years in question Mobil did not market, at least to any appreciable degree in Oklahoma, even though the price for liquid asphalt in Oklahoma was several cents per gallon higher than it was in Kansas. To counter such evidence, Mobil offered evidence of attempts to market its liquid asphalt in Oklahoma in 1966. By way of rebuttal, the plaintiffs then attempted to show that such belated efforts of Mobil were to forestall antitrust prosecution at a time when it was under investigation. In sum, our study of the record convinces us that there is sufficient evidence, both direct and circumstantial in nature, to support the jury's answer to a specific interrogatory that Mobil was indeed a party to the conspiracy in question.

Alleged POST-VERDICT ERROR

Plaintiffs contend that the trial court erred in three particulars leading up to the entry of formal judgment, all occurring after the jury had returned its verdict. Before discussing those matters, let us first examine the verdict returned by the jury.

As indicated, the jury did not return a general verdict, but answered a considerable number of special verdict interrogatories. For example, by its answers the jury found that Mobil, DX, Kerr-McGee and Phillips, but not Skelly, had conspired to fix, maintain and stabilize the price of liquid asphalt purchased by the plaintiffs in Oklahoma and that such conspiracy unreasonably restrained interstate trade or commerce. By answer to another interrogatory, the jury found that the aforesaid conspiracy began in January 1962 and terminated in December 1966. Pursuant to direction, the jury then assessed the damages by dollar amount of Standard and Metropolitan, separately, for each year the conspiracy was in existence, i.e., 1962, 1963, 1964, 1965 and 1966. By answer to an interrogatory, the jury also found that the defendants had not "wrongfully, fraudulently or effectively concealed" the conspiracy from either of the plaintiffs. We shall now examine the errors which allegedly occurred after the return of the jury's verdict leading up to the entry of judgment.

1. Refusal of Trial Court to Rule that the 4 Year Statute of Limitations Contained in 15 U.S.C. § 15b had been Tolled by 15 U.S.C. § 16(b).

Section 15b of 15 U.S.C. provides that an action brought under 15 U.S.C. § 15 is barred unless commenced within four years after the cause of action occurred. Anticipating that this statute of limitations might be pleaded by the defendants as one of their defenses, which it was, the plaintiffs in their complaint pleaded fraudulent concealment in an effort to toll the running of the statute. In this general connection, we would parenthetically note that the plaintiffs in their complaint alleged the existence of a conspiracy in restraint of interstate trade existing from 1954 through 1966, and sought damages for each of the thirteen years of conspiracy's existence. Also, by way of general background, plaintiffs instituted the present proceedings on December 1966 against all defendants ex-

cept Kerr-McGee and Phillips, who were added as additional defendants in December 1967.

In line, then, with the pleadings the pre-trial order set forth as one of the issues in the case the question of whether there was fraudulent concealment by the defendants of their conspiratorial activities. As mentioned above, the jury found no such fraudulent concealment. Then some eight weeks after the jury's verdict, the plaintiffs attempted to inject into the proceedings the issue as to whether the four-year statute of limitations, if not tolled by fraudulent concealment, was nonetheless tolled by 15 U.S.C. § 16(b).

Section 16(b) of 15 U.S.C. provides, *inter alia*, that the institution by the United States of any civil or criminal antitrust proceeding shall suspend the running of the four-year statute of limitations in respect of every private right of action "based in whole or in part on any matter complained of in said proceeding * * *." In this regard, we are advised that the United States instituted a criminal antitrust proceeding in Missouri on July 22, 1965, wherein Mobil, Kerr-McGee and Phillips, along with many others, were named defendants and that the United States instituted another criminal antitrust proceeding in Kansas on April 5, 1966, again against Mobil, Kerr-McGee, Phillips, and others. If these criminal proceedings did suspend the running of the four-year statute of limitations, then the plaintiffs could recover damages for all five years the jury determined the conspiracy was in existence, i.e., 1962, 1963, 1964, 1965 and 1966. Jumping ahead, the trial court only allowed the plaintiffs damages for the years 1964, 1965 and 1966. The propriety of that particular determination will be examined in the next section, and for the moment we are only concerned with the correctness of the trial court's refusal to allow the plaintiff's to raise the provisions of 15 U.S.C. § 16(b).

The basic reason assigned by the trial court for refusing the plaintiffs to raise the issue as to whether the criminal antitrust proceedings suspended the running of the four-year statute of limitations was that the request came too late. We agree. All parties were fully apprised by the pleadings of the case which were reflected in the pre-trial order that the defendants were invoking the four-year statute of limitations. The plaintiffs sought to avoid the statute by alleging that there was fraudulent concealment by the defendants of their conspiratorial acts. The jury by its verdict found no such fraudulent concealment. Then, weeks after the return of the jury's verdict, the plaintiffs sought to inject a new issue into the case. Under such circumstances we agree with the trial court that the request came too late in the day.

In support of our disposition of this phase of the controversy, see such cases as National & Transcontinental Trading Corp. v. International General Electric Co., Inc., 15 F.R.D. 379 (S.D. N.Y. 1954). In that case, the Honorable Irving R. Kaufman, then a United States District Judge, declared as follows:

> "Plaintiff contends that the pendency of the aforementioned action by the United States in the District Court for New Jersey suspended the statute of limitations for the period January 27, 1941, when the New Jersey action was commenced, until October 8, 1953, the date when final judgment was entered in favor of the United States. Nowhere however does the complaint allege that any of the allegations of the complaint are 'based in whole or in part on any matter complained of' in the New Jersey action. Such allegations are essential if the bar of the statute is to be avoided."

See also in this general connection Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971), where it was indicated that a trial judge would not err in rejecting an affirmative defense which was untimely presented.

2. Error by the Trial Court in Entering a So-called "Unitary Judgment."

The trial court determined that the judgment to be entered against the defendants would be joint and several and that it would include damages incurred during the "four years immediately preceding the joinder of Kerr-McGee and Phillips." As indicated above, the present action was commenced in December 1966 against Mobil and DX, along with ten other companies. However, Kerr-McGee and Phillips were not added as defendants till December 1967. By its determination that the four-year period of time would be the four years immediately preceding the joinder of Kerr-McGee and Phillips, the trial court limited the damage period to the calendar years of 1967, 1966, 1965 and 1964. By its answer to a special interrogatory, the jury had determined that the conspiracy terminated December 31, 1966. So, the judgment thus entered against the four defendants, jointly and severally, limited the plaintiffs' damages to those occurring during the three years of 1966, 1965 and 1964.

Plaintiffs now contend that such limitation was erroneous. They argue that under Fed.R.Civ.P. 20(a), judgment should have been entered for the plaintiffs according to their "respective rights to relief," and "against one or more defendants according to their respective liabilities." Hence, they say, there was no need to enter a so-called "unitary judgment."

In this general regard, the complaint is not so much that any judgment against Kerr-McGee and Phillips should be limited to damages occurring in 1966, 1965 and 1964. Rather, the problem arises in connection with Mobil and DX. The action against those two companies was instituted in December 1966, and the four years immediately preceding that date would include the calendar years of 1966, 1965, 1964 *and* 1963. As noted, *supra*, the jury did fix the damages sustained by the plaintiffs as a result of the

conspiracy for that year, as well as 1962. As we understand plaintiffs' present position on this particular matter, it is suggested that a joint and several judgment against all four defendants for damages incurred in the years 1966, 1965 and 1964, which was the judgment entered by the trial court, was proper, but that such would not, and should not, preclude a separate joint and several judgment against Mobil and DX only for plaintiffs' damages occurring in 1963. We agree.

As indicated, the action against Mobil and DX was commenced in December 1966, and the four-year statute of limitations would permit the plaintiffs to recover damages from those two companies for the years 1966, 1965, 1964 *and* 1963. We fail to see how the fact that the action against Kerr-McGee and Phillips was not commenced till a year later should inure to the benefit of Mobil and DX. This is not an instance of apportioning damages among joint tort-feasors. Rather, we are simply awarding plaintiffs the damages decreed by the jury in its verdict in a manner consistent with Fed.R.Civ.P. 20(a).

In support of the foregoing, *see* Philco Corporation v. Radio Corporation of America, 186 F.Supp. 155 (E.D.Pa. 1960), at 166, and Charles Rubenstein, Inc. v. Columbia Pictures Corporation, 176 F.Supp. 527 (D.C.Minn. 1959), at 536, *aff'd*, 289 F.2d 418 (8th Cir. 1961). In *Philco*, it was held that in a civil antitrust action the trial court was not required to enter a single judgment against all defendants which would run for the shortest period of limitation applicable to any one defendant. And in *Rubenstein*, again a civil antitrust proceeding, it was contended that the trial court could not apportion damages among tort-feasors, but must hold all defendants jointly and severally liable. In rejecting that contention, the statute of limitations there in question was held to be "personal" to each individual defendant and that there was "no good reason why damages may not be assessed against the various defendants

in the amounts and according to the liabilities established." We subscribe to such reasoning.

3. Refusal of the Trial Court to Grant Plaintiffs' Motion to Dismiss Kerr-McGee and Phillips.

After it became apparent that the four-year statute of limitations was not to be tolled in any fashion, and after the trial court had further indicated that it proposed to enter a joint and several judgment against all four defendants for damages incurred in the years of 1966, 1965 and 1964, but not 1963, the plaintiffs in a tactical move designed to obtain a judgment for damages incurred the year 1963, as well, moved to dismiss Kerr-McGee and Phillips from the case, hoping thereby to obtain a judgment against Mobil and DX for the four years of 1966, 1965, 1964 and 1963. Not surprisingly, Kerr-McGee and Phillips consented to the granting of the motion to dismiss them from the case and Mobil and DX objected. The trial court denied the motion, and the plaintiffs and Kerr-McGee and Phillips now assign that as error.

The motion to dismiss Kerr-McGee and Phillips coming after trial and moments before the entry of judgment was a matter lying within the sound discretion of the trial court and we find no abuse of that discretion. Fed-R.Civ.P. 15(a), 21 and 41(a) (2). See such cases as Shaffer v. Evans, *per curiam*, 263 F.2d 134 (10th Cir. 1958), *cert. denied*, 359 U.S. 990 (1959), where it was held that a motion by the plaintiff to dismiss after issue had been joined, but before trial, was addressed to the sound discretion of the trial court.

Accordingly, the judgments as entered are affirmed, but the case is remanded with direction that the trial court enter in favor of the plaintiffs a joint and several judgment against Mobil and DX only for damages incurred by the plaintiffs in the year 1963.

APPENDIX B

In the United States District Court for the Western District of Oklahoma.

No. 66-478 Civ.

STANDARD INDUSTRIES, INC., a corporation, and METROPOLITAN PAVING CO., INC., a corporation, Plaintiffs.

versus

SKELLY OIL COMPANY, a corporation, MOBIL OIL CORPORATION, a corporation, SUNRAY-DX OIL COMPANY, a corporation, KERR-McGEE CORPORATION, a corporation, and PHILLIPS PETROLEUM COMPANY, a corporation, Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Luther B. Eubanks, District Judge, presiding, and the issues having been tried and the jury having duly rendered its special verdict upon interrogatories,

IT IS ORDERED AND ADJUDGED:

1. The plaintiffs and each of them shall take nothing against the defendant Skelly Oil Company, and Skelly Oil Company shall have and recover its costs against the plaintiff Metropolitan Paving Company in the amount of $2,740.31 and against the plaintiff Standard Industries, Inc. in the amount of $1,370.18.

2. The plaintiff Metropolitan Paving Company, Inc. shall have and recover of and from the defendants Mobil Oil Corporation, Sunray DX Oil Company, Kerr-McGee Corporation, and Phillips Petroleum Company, jointly and severally, the sum of $286,128.01; together with the sum of $84,000.00 as and for attorney's fees fixed and allowed

by the Court, and shall further have and recover its costs against said defendants in the amount of $7,100.44.

3. The plaintiff Standard Industries, Inc., shall have and recover of and from the defendants Mobil Oil Corporation, Sunray DX Oil Company, Kerr-McGee Corporation, and Phillips Petroleum Company, jointly and severally, the sum of $133,634.06, together with the sum of $42,000.00 as and for attorney's fees fixed and allowed by the Court, and shall further have and recover its costs against said defendants in the amount of $3,550.22.

4. The judgments rendered in paragraphs 2 and 3 hereof, in the total amount of $556,462.73, and the judgment rendered in paragraph 1 hereof in the total amount of $4,110.49, will draw interest from this date at the rate of 10% per annum.

5. The defendants Mobil Oil Corporation, Sunray DX Oil Company, Kerr-McGee Corporation and Phillips Petroleum Company are granted 30 days in which to file a supersedeas bond in the amount of $750,000.00, during which time execution on this judgment is stayed. Upon the filing of such bond, execution shall be stayed pending disposition of an appeal, if one be taken. By agreement of the parties, the said supersedeas bond need not be executed by a surety company, but shall be executed by each individual defendant in its own capacity and as surety for each of the other defendants.

6. This judgment and all the provisions thereof shall be effective as of this date.

ENTERED this 16 day of October, 1970.

Luther B. Eubanks,
UNITED STATES DISTRICT JUDGE

O.K. AS TO FORM:

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Attorney for Mobil Oil Corporation

Truman B. Rucker
Attorney for Sunray DX
Oil Company

Coleman Hayes
Attorney for Kerr-McGee
Corporation

R. B. McDermott
Attorney for Phillips Petroleum
Company

JUDGMENT ENTERED IN CIVIL DOCKET ON Oct. 16, 1970.

Adelaide Holston, Deputy

Filed October 16, 1970.

MARCH TERM—APRIL 27, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Circuit Judge, and Honorable Frank G. Theis, District Judge

STANDARD INDUSTRIES, INC., a Corporation, and METROPOLITAN PAVING CO., INC., a Corporation,	)	
Plaintiffs-Appellants	)	Nos. 71-1115
	)	71-1116
v.	)	71-1117
	)	71-1118
MOBIL OIL CORPORATION, a Corporation,	)	71-1119
SUNRAY-DX OIL COMPANY, a Corporation,	)	
KERR-McGEE CORPORATION, a Corporation,	)	
and	)	
PHILLIPS PETROLEUM COMPANY, a Corporation,	)	
Defendants-Appellees and Cross-Appellants.	)	

This matter comes on for consideration of the petition for rehearing and for hearing en banc of Sunray-DX Oil Company, Defendant-Appellee and Cross-Appellant; petition for rehearing and suggestion of rehearing en banc of defendants-appellees and cross-appellants; and petition for rehearing of plaintiffs-appellants in the captioned cases.

Upon consideration whereof, the petitions for rehearing are denied by Chief Judge Lewis, Circuit Judge McWilliams and District Judge Theis, to whom the cases were argued and submitted.

The petitions for rehearing having been denied by the original panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petitions for rehearing en banc are denied. Judge Holloway did not participate in the petitions for rehearing en banc.

s/ Howard K. Phillips

HOWARD K. PHILLIPS,
Clerk

APPENDIX C

62 Stat. 928, 28 U.S.C. §1254

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *".

Rules of the Supreme Court, Rule 19, CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) * * *

(b) Where a court of appeals has rendered a decision in conflict with the decision of another

court of appeals on the same matter; * * * or has decided an important question of federal law which has not been, but should be, settled by this court; * * *"

§1 The Sherman Act, 26 Stat. 209, 15 U.S.C. §1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *"

§ 4 The Clayton Act, 38 Stat. 731, 15 U.S.C. §15

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

FILE COPY

Supreme Court, U. S.
FILED
JUL 9 1973
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1689

STANDARD INDUSTRIES, INC., a corporation, and METROPOLITAN PAVING CO., INC., a corporation,
Petitioners,

VERSUS

MOBIL OIL CORPORATION, a corporation, SUNRAY-DX OIL COMPANY, a corporation, KERR-McGEE CORPORATION, a corporation, and PHILLIPS PETROLEUM COMPANY, a corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

(Names and Addresses of Counsel Appear at the Conclusion of Brief)

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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In the

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 475 F.2d 220. It appears as Appendix A to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether it is reversible error for a court to instruct a jury in a treble damage case brought under the Sherman and Clayton Acts, without regard to the circumstances of the particular case, that it is the function of the jury to find the actual damages, if any, sustained by the plaintiff, and that it is the function of the court, not the jury, to treble the damages so found and to award costs and attorneys' fees.

THE STATUTE AND RULE INVOLVED

The statutes and rule involved are set forth in Exhibit C to the Petition at pp. xxviii and xxlx.

STATEMENT

This action was instituted by petitioners against respondents and others to recover damages for alleged price fixing in the sale of liquid asphalt in violation of the Sherman Act.

During the trial, which lasted seven or eight weeks, many controversial situations arose which caused the trial court great concern. One such incident was particularly provocative. A Mr. Kavanaugh, who was president of petitioner Metropolitan and a vital cog in the management of petitioner Standard, testified as a witness for petitioners, whose counsel inquired of him concerning the cost and expense incurred in preparing the case for trial and his contribution thereto. The court in two instances sustained objections to such questions, after which the witness

mumbled under his breath that he had borrowed and contributed $150,000.00.

Prompted at least in part by this inexcusable conduct, the court gave an instruction (No. 28) of which petitioners here complain.

The propriety of giving such an instruction is the principal issue here.

ARGUMENT

Petitioners at the outset extol the virtues of the motives which prompted Congress to impose treble damages on a violator, and say that the instruction frustrates the hope, and perhaps, belief that such a penalty would serve as a deterrent to those who might otherwise violate the Acts. It need only be pointed out that a deterrent operates, if at all, before the act, not afterwards.

Petitioners take the position, as they did below, that reversible error occurs when a trial judge, regardless of the circumstances of the particular case, discloses to a jury that under the Acts relied upon by plaintiffs any damages which the jury finds they suffered will be trebled. The court below rejected this contention, notwithstanding a then recent opinion of its own,[1] which, it is said, creates a conflict within the circuit itself with resulting "utter confusion."

The court below saw no conflict, but rather a different record, which reflected ample reasons for giving the in-

---

[1] *Semke* v. *Enid Automobile Dealers Association*, 456 F.2d 1361 (1972)

struction. In *Semke* nothing had occurred in the trial court which required or invited such an instruction. Not so here.

Furthermore, the interpretation and application by a Court of Appeals of its own prior decisions does not present an issue which calls for review by this Court.

Attention has been called to what can only be described as gross and deliberate misconduct on the part of the president of one of the petitioners. It was so considered by the trial judge, who explained his reason for giving the instruction of which petitioners here complain by saying:

> "I think (the instruction) might be more justified in this case than in any I know of as tending, maybe, partially to offset the damage that could result from this statement that Mr. Kavanaugh made, which we have discussed fully at other times about his borrowing and spending $150,000.00 in the preparation of this case.
>
> ". . . (T)hat disturbs me no end, the reason that he had twice been admonished not to answer such a question and then mumbling it under his breath, or I didn't hear it, none of the defense lawyers heard it . . ., but one juror did, and if that jury be inclined to say we are going to award him whatever damages he has, plus give him his $150,000.00 back, this instruction might bridle them. . . ." (Ap. 2675-2676)

The court below found additional reasons which it enumerated and discussed at some length. (Page v, Appendix A to the Petition). One of these involved massive publicity (Ap. 3285-3295) which, as the court below pointed out, ". . . stated that the suits involved amounts which were triple the amount of damages allegedly suffered."

As petitioners point out, numerous courts in those jurisdictions in which the pleadings are furnished to the juries have uniformly held that such an instruction is not only proper but necessary. In *Cape Cod Food Products, Inc. v. National Cranberry Ass'n*, 119 F.Supp. 900, 911, Judge Wyzanski instructed the jury that:

> "With respect to damages, you may be somewhat, misled by something that you see in the complaint, and just to avoid any misleading I am going to make explicit one point. You are only to calculate damages, if any, or loss of profits, if any, upon the basis of single, and not treble, damages. It is true that under the antitrust act, if the plaintiff prevails, the judgment which he would ultimately get would be three times the amount of his damages and loss of profits. But the trebling of the amount is no part of the jury's function. That is a question for the court."

It makes no difference whether jurors learn of the fact that the case before them is a treble damage action from the pleadings or from newspapers. It would be a safe bet that more jurors read the newspapers than do the pleadings in a treble damage case. Furthermore, the court below, as it should, attached importance to the Kavanaugh incident, and summarized its analysis of the situation reflected by the record as follows:

> "It was in this general setting, i.e., considerable pretrial publicity, some discussion about treble damages in closing arguments, and misconduct by the witness Kavanaugh, that the court felt constrained to affirmatively instruct the jury that in the event it found for the plaintiffs it should award the plaintiffs their actual damages, and that the matters of trebling, costs and

> attorney's fees were 'no part of the jury's function' and were 'questions' for the court. *Under such circumstances*, we conclude that the giving of the instruction in question did not constitute reversible error. Repeating, the jury was correctly instructed as to the damages that could be awarded and then simply informed that the other matters, i.e., trebling, costs, and attorney's fees were 'questions' for the court. We perceive no prejudice to the plaintiffs from the instructions thus given." (Emphasis supplied.)

There is no conflict between the Court's decision in this case and that of any other circuit. On the contrary, the only two Court of Appeals decisions—the one here and that in *Bordanaro Brothers Theatres, Inc.* v. *Paramount Pictures, Inc.*, 203 F.2d 676 (2nd Cir., 1953)—are completely harmonious. In *Bordanaro* the Court pointed out that one of the assignments of error involved references by the court and counsel to a former case and treble damages, and said:

> "Surely reference either to the pleadings or to the governing statute is so usual a course in jury trials as to occasion no comment. Hence the recital in the trial judge's charge of just what had happened in the former action and what was claimed in this suit was quite appropriate. Such a statement is more desirable than a half-recital, with attempted concealment of a part—a method leading inevitably to an overemphasis of an otherwise not significant detail."

Neither is any conflict demonstrated among the districts. It is true that different results have been reached by some of the District Courts, but none have unequivocally adopted the rule here sought by petitioners. As a matter of

fact, those courts which have frowned upon a disclosure of the trebling provision of the Clayton Act have taken pains to point out that differing circumstances justify different conclusions. In fact, the cases on which petitioners rely support the conclusion reached by both the trial court and the Court of Appeals in the instant case.

In *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 135 F.Supp. 4, 11, Judge Holtzoff pointed out:

> "There may be some reason for imparting the information to the jury in those districts in which it is customary to supply the pleadings to the jury in civil cases, because otherwise the jury on reading the prayer for relief might be confused by the demand for triple damages and might be perplexed by a doubt whether it was its duty to multiply the actual damages by three."

The Court of Appeals reversed a judgment for plaintiff, and therefore did not examine or decide the question here. 243 F.2d 418 (C.A.D.C. 1957).

In *Sablosky* v. *Paramount Film Distributing Corporation*, 137 F.Supp. 929 (D.C.E.D. 1955), Judge Grim adopted the conclusion and reasoning of Judge Holtzoff, including that portion quoted above which was incorporated in his opinion.

Instead of conflict and confusion which petitioners assert exists, it appears that all of the courts recognize and affirm that there may be and are good and sufficient reasons under varying circumstances for revealing to a jury, rather than concealing from it, the provisions of the controlling statute law.

Here both the trial and appellate courts found the existence of such reasons. Both were right.

In their "Conclusion," petitioners assert that if the giving of the instruction constituted reversible error, they should have a new trial ". . . limited solely to the issue of damages." The only reason offered in support of such a contention is the assertion that if the instruction was erroneously given, ". . . it could *only* prejudice the plaintiffs with regard to the *amount* of their recovery."

Such conjecture finds no support in the record. The jury did what juries are supposed to do. It weighed conflicting evidence and arrived at a verdict determining the damages sustained by petitioners. The Court of Appeals rejected the contention here made, simply pointing out:

> "The extent of plaintiffs' damages was, as were most of the issues in the case, disputed issues and the jury's monetary award finds support in the record."

No resort to the record is necessary to support this conclusion. It should suffice to note petitioners' statement that, "There was evidence from which the jury could have easily determined that the overcharge was 3¢ per gallon." It can hardly be seriously contended that the evidence compelled a finding by the jury of what petitioners say it might have found.

CONCLUSION

Unless the Court is prepared to say that in no case such as this is it proper to advise a jury of the provisions of the Act on which plaintiffs rely, including the trebling feature, no matter what the circumstances are, the judgment of the Court of Appeals on the issue here is right, and the Petition should be denied.

Respectfully submitted,

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On Behalf of the above Respondents and their attorneys.

DATED: July, 1973

FILE COPY

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1689

STANDARD INDUSTRIES, INC., a corporation, and METROPOLITAN PAVING CO., INC., a corporation,

Petitioners,

VERSUS

MOBIL OIL CORPORATION, a corporation, SUNRAY-DX OIL COMPANY, a corporation, KERR-McGEE CORPORATION, a corporation, and PHILLIPS PETROLEUM COMPANY, a corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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August, 1973

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

STATEMENT

Respondents' basic argument is that the giving of the "trebling" instruction was correct, and that this Court, therefore, should deny Petitioners' request for certiorari review. This Brief is submitted, pursuant to the permissive provisions of Rule 24.3, in reply to that argument. Respondents seek to support their position here, as in both courts

below, almost solely by reliance on the alleged "misconduct" of a witness called to the stand by Petitioners. The facts in the record simply do not support Respondents' charge of "misconduct." However, even if all Respondents' allegations *were* absolutely true, the entire situation as described by them *still* would have nothing whatever to do with the question of the propriety of instructing a jury, in a *Sherman Act* case, that its verdict would be trebled. Such an instruction is simply not the proper solution to alleged witness misconduct. If the instruction was improper because it contravened the purpose of the nation's antitrust laws, it could not be changed into a proper instruction simply because of the *unrelated* misconduct of a witness. The "reason" advanced by Respondents is, in truth, no more than an excuse for imparting patently prejudicial information to a jury.

A. The Pertinent Facts

As indicated above, quite aside from the fact that Respondents' argument is a classic *non-sequitur*, it rests upon the totally inaccurate assumption that there *was:* (a) misconduct, involving (b) a "whispered" remark to the jury. In the words of Respondents:

> "The Court in *two* instances sustained objections *to such questions, after which* the witness *mumbled under his breath*, that he had borrowed and contributed One Hundred Fifty Thousand Dollars." Respondents' Brief, pages 2-3 [Emphasis supplied here, and throughout this Brief unless otherwise indicated].

Contrary to the above quoted assertion, the trial court did *not* sustain objections to the *same* questions, and the record so reflects [pages 2363-2366 of the Transcript and A. 1149-1151, R. 15, pp. 2461-2462; A. 1642-1644, R. 22, pp. 3695-3698; A. 1232-1235, R. 16, pp. 2628-2630]. The questions covered *different* subjects (which were addressed, in both instances, to matter initially delved into by the Respondents). Although the court clearly sustained an objection to the first line of questioning, it is certainly incorrect to state, as do Respondents, that the witness deliberately testified to a matter to which a previous objection had been sustained. The record makes apparent that the Trial Court Judge never fully realized that the first question put to the witness by Petitioners' counsel (to which an objection *was* sustained) was entirely different from the question to which an answer was given simultaneously with another defense objection, causing the incident dramatized in Respondents' Brief. The foregoing situation was unquestionably caused by the fact that the Trial Court Judge *never* conducted a hearing on the matter, even though the court initially indicated that it would fully explore the incident at the time of its ruling on post-trial Motions. [Transcript of Motion and Closing Argument, R. 35, pp. 5965-5966, A. 2656-2657.] Thus, neither counsel nor witness was ever afforded a full opportunity to explain, on the record, the reasons for which the answer was given and to demonstrate not only that the answer was not violative of any prior Court ruling but was entirely justified by the circumstances.

The second portion of Respondents' assumption, that the statement was "whispered" or "mumbled" under the

witness' breath, is specifically contradicted by the record. The quoted words are those of the Trial Judge—and the record affirmatively reflects that he did not hear the witness answer at all. [A. 1646, R. 22, p. 3702; R 35, pp. 5966 and 6244; R. 2657 and 2676.] The language quoted by Respondents in their Brief *was* spoken by the Trial Judge, but it is no more than a paraphrase of the contentions made by defense counsel at the time of trial—contentions made outside of the presence of the witness and at a time when there was *no* opportunity available to fully explore the subject incident. Even so, in the informal discussion held in Chambers where the subject first came to light, the contention that the answer was whispered was specifically contradicted by the Court Reporter, the only official present who *did* hear the witness' answer. He stated, contrary to the Respondents' statement herein, that the answer came simultaneously *with* (rather than *after*) an objection by counsel and that the answer was *not* whispered. Witness the following language:

> THE REPORTER: "We have this problem, that when two people speak at one time, overlap, it is necessary that one be written while the statement of the other must be retained and written at the completion of the first. In other words, there is no way to show in the record that it's said simultaneously. So, actually, the record cannot show the exact manner in which it was said."
>
> THE COURT: "*Did he say it kind of under his breath?*"
>
> THE REPORTER: "It was about like this. *My memory of it is that it was said above a whisper, but rather rapidly.*"

THE COURT: "I don't know, I was listening to the lawyers object or something, *I didn't hear it.*"

The above presents the not unusual courtroom situation which occurs when a witness' answer is interrupted by a lawyer's objection. The witness is apt to lower his voice, although still completing his answer. In the instant circumstance, it was simply a case of two people talking at the same time, with the lawyer obviously speaking louder than the witness. Had an evidentiary hearing been held, either before or after the verdict was returned, we are confident it would reflect that there was no surreptitious "whispering," or other clandestine communication of "improper" matter to the jury as argued by the oil companies.

Unfortunately, the Trial Judge was obviously determined to take *some* action as a result of the above described incident, even though all the facts were not before him; and it is perfectly apparent that he erred in attempting to meet the situation by giving an instruction premeditatedly designed to "bridle" the jury by inducing it to render a verdict *smaller* than that justified by the evidence. Other avenues were readily available. Had the trial court permitted the jury to reach a verdict unaffected by the knowledge it would be trebled, then, after a consideration of the amount of the verdict as it related to the evidence, the Trial Judge could have directed a remittitur of any amount he felt might represent reimbursement for expenses. Or, the court could have remedied any misconception about expenses by merely instructing the jury that successful plaintiffs would recover "expenses," as a matter of course *without also* telling the jurors that the amount of their verdict was to

be multiplied times three. The judgment on the verdict would then reflect the jury's *true* finding as to the actual damages, reduced by such amount as the court then deemed justified by the remark to the jury. Such conduct would have totally eliminated any prejudice claimed by the defendants, and the entire procedure, itself, could have been reviewed on appeal. The trial court's failure to adopt the standard procedure in such circumstances permitted prejudicial, irrelevant information to be furnished the jury.

A general verdict was not returned in this case, and the utter absurdity of giving an "instruction" *at all* in circumstances where the jury's *only* function was to *fill in blanks* in a set of Special Verdict Interrogatories calling *only* for the "cents per gallon" overcharge must be apparent. Quite obviously, the jury did not need to be "instructed" in this regard at all. The improper instruction was given *solely* for *punitive* purposes at the request of the defendants, and that is a fact as incandescent as the mid-day sun. Its sole purpose was to punish plaintiffs for the *alleged* misconduct of a witness. If one were to assume, *arguendo*, that there was a problem created by the answer given by the witness (and the record is to the contrary) it is difficult to conceive of a "solution" any more fundamentally at odds with basic due process than the action taken by the trial court.

B. Applicable Law

As advocates we are unable to disguise our admiration of the adroitness with which counsel has presented the contention that there is no present conflict between the Circuits concerning whether the "trebling" instruction should be given. However, when that argument is exposed to the exact language used by the various courts considering the question, it falls of its own weight. Respondents' contention is based on the rather mundane assertion that the courts have recognized that "differing circumstances justify different conclusions"; quoted in support is the dictum in *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 135 F.Supp. 4, 11 (D.C. D.C. 1955), in which that Court recognized, *in those jurisdictions in which the pleadings were furnished to the jury*, that a prayer for treble damages might confuse the jury. However, the conflict between the Second and Tenth Circuits has been specifically recognized by the latter Circuit in *Semke* v. *Enid Automobile Dealers Association*, 456 F.2d 1361 (10th Cir. 1972), in its holding that the giving of such instruction was "error."

CONCLUSION

The oil companies commenced their defense in the case at bar by portraying these plaintiffs as "treble damage bounty hunters." [Supp. R. 1, p. 3, *et seq.*; and p. 14, *et seq.*] The treble damage "instruction" at the close of all the evidence permitted the defense to conclude on a similar note. When price-fixing defendants are allowed to portray the victims of their illegal conspiracy as fortune hunters seeking damages far in excess of the injuries suffered, a result

can be anticipated which does violence to the purpose for which the treble damage provision of *The Clayton Act* was devised. We respectfully suggest that our Courts, including this one, should not aid price-fixers in the attainment of such a result.

Respectfully submitted,

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Counsel for Petitioners

of Counsel on Brief:

JOSEPH A. CLARO

August, 1973

CERTIFICATE

This is to certify that the attached Brief in Opposition has been served by mailing three copies thereof to counsel for each petitioner.

Dated this ..... day of August, 1973.

.....

John Anthony Claro